

In The
Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-01-078 CV

WILLIAM J. BEASLEY, ET AL., Appellants

V.

MARIA MOLETT, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 00-06-03412-CV

OPINION

William J. Beasley and others⁽¹⁾ sought to enjoin all judicial proceedings currently being conducted under the terms of the Civil Commitment of Sexually Violent Predators Act ("Act"), Title 11, Chapter 841 of the Texas Health and Safety Code, and requested that Maria Molett, the Council on Sex Offender Treatment's representative on the multidisciplinary team ("Team"), and her successors be enjoined from attending meetings of the Team. They also sought a judgment declaring the statute unconstitutional on its face and in its application. The trial court denied the relief requested. This appeal raises issues concerning due process, equal protection, the Fifth and Sixth Amendments, separation of powers, double jeopardy, *ex post facto* law, and the Texas Open Meetings Act.

The Act

In the first section of the Act, the Texas Legislature in effect set out the purpose for the Act in legislative findings, as follows:

§ 841.001. Legislative Findings

The legislature finds that a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence. The legislature finds that the existing involuntary commitment provisions of Subtitle C, Title 7, are inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to society. The legislature further finds that treatment modalities for sexually violent predators are different from the traditional treatment modalities for persons appropriate for involuntary commitment under Subtitle C, Title 7. Thus, the legislature finds that a civil commitment procedure for the long-term supervision and treatment of sexually violent predators is necessary and in the interest of the state.

Tex. Health & Safety Code Ann. § 841.001 (Vernon Supp. 2003). The Act then sets forth a civil commitment procedure for the long-term supervision and treatment of sexually violent predators.

The statute is attacked in this proceeding as unconstitutional. In cases involving assertions that a statute is unconstitutional, courts begin the analysis with a presumption that the statute is valid. *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995). The legislature is presumed not to have acted unreasonably or arbitrarily. *Id.* A mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable. *Id.* The wisdom or expediency of the law is the legislature's prerogative. *Id.*

For the reasons detailed below, we affirm the trial court's judgment.

**Due Process and Equal Protection:
Behavioral Abnormality Standard**

Appellants contend in issue I.A. that the "behavioral abnormality" standard expressed in the Act violates due process because, they say, the standard does not require a "mental" condition. Section 841.003 of the Act defines a sexually violent

predator as a repeat sexually violent offender who suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. Tex. Health & Safety Code Ann. § 841.003 (Vernon Supp. 2003). Section 841.002(2) of the Act defines "behavioral abnormality" as a "congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person." Tex. Health & Safety Code Ann. § 841.002(2) (Vernon Supp. 2003). In *Kansas v. Hendricks*, 521 U.S. 346, 357, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), the Supreme Court held that a Kansas law dealing with sexual predators did not violate due process. The Kansas law required a showing that the person sought to be committed had been convicted of or charged with a sexually violent offense and that the person suffered from a mental abnormality or personality disorder, making the person likely to engage in predatory acts of sexual violence. *Id.* 521 U.S. at 351-52. The law defined a mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." *See* Kan. Stat. Ann. § 59-29a02(b) (1994).

Appellants concede that the Texas definition of "behavioral abnormality" is virtually the same as the Kansas definition of "mental abnormality." However, they argue that the Texas statute does not meet due process requirements because it does not use the term "mental" in its description of the condition required for commitment. But the United States Supreme Court has held that state legislatures are not required to adopt a particular nomenclature in drafting civil commitment statutes. *Hendricks*, 521 U.S. at 359. Statutory terms need not mirror terms used by the medical profession; they serve different purposes. *Id.* Furthermore, we focus not on the label but on the proof requirement itself as set forth in the definition. Because the proof requirement of the Act is virtually the same as that upheld in *Hendricks*, we reject appellants' due process challenge to the "behavioral abnormality" standard.

Appellants argue that the Act violates equal protection because it allows a category of sex offenders targeted by the Act to be civilly committed on the basis of antisocial personality disorders, while not providing for similar treatment of other violent criminals on the same basis. We first note that the Act does not use the phrase "antisocial personality disorder." The Act does target what the legislature characterizes as "a small but extremely dangerous group of sexually violent predators" who "have a behavioral abnormality that is not amenable to traditional mental illness treatment modalities and that makes the predators likely to engage in repeated predatory acts of sexual violence." § 841.001. The legislature found that "the existing involuntary commitment provisions . . . are inadequate to address the risk of repeated predatory behavior that sexually violent

predators pose to society." *Id.* Appellants do not challenge the legislative findings.

Under the rational relation test, the statutory distinction is presumed constitutional as long as the distinction is rationally related to a legitimate governmental purpose. *See Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457-58, 108 S.Ct. 2481, 101 L.Ed 2d 399 (1988). Given the inadequacy of the ordinary civil commitment process and treatment modalities, the Act's establishment of a separate civil commitment procedure that provides long-term supervision and outpatient treatment for sexually violent predators is rationally related to the legitimate governmental purpose of protecting society while providing necessary treatment and supervision. The Supreme Court has held the legislature is free to recognize degrees of harm, and the legislature may properly confine restrictions to those classes of cases where the need is deemed to be clearest. *See Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 275, 60 S.Ct. 523, 84 L.Ed.744 (1940). The statute is not to be overthrown because there are other instances to which it might have been applied. *Id.* Distinguishing a class of sexually violent predators from violent criminals for the purpose of involuntary commitment does not violate equal protection rights under the United States Constitution. *See id.* 309 U.S. at 274-75. We overrule issue I.A.

Due Process and Equal Protection: Expert Testimony

In issue I.B., appellants urge the Act violates their rights to due process and equal protection because, they say, the Act does not require that the determination of status as a sexually violent predator be based upon competent expert testimony. Article I, section 15-a, of the Texas Constitution provides that no person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony. *See Tex. Const. art. I, § 15-a.* The Act provides, in determining whether to seek commitment of a person, the multidisciplinary team ("Team") may request the assistance of others in making a determination of whether the person is likely to commit a sexually violent offense after release or discharge. *See Tex. Health & Safety Code Ann. § 841.022(b), (c)* (Vernon Supp. 2003). If the Team recommends the assessment of a person for a behavioral abnormality, the Texas Department of Criminal Justice ("TDCJ") or the Texas Department of Mental Health and Mental Retardation ("MHMR") must use an expert to examine the person to aid in the determination. *See Tex. Health & Safety Code Ann. § 841.023(a)* (Vernon Supp. 2003). Both the person whose commitment is sought and the State are entitled to an immediate examination of

the person by an expert prior to trial. Tex. Health & Safety Code Ann. § 841.061(c) (Vernon Supp. 2003). These statutory provisions, when read together with the constitutional requirement that an involuntary commitment not occur in the absence of competent medical or psychiatric testimony, indicate the legislature intended there be competent medical or psychiatric testimony to support an involuntary commitment under the Act, and provided for it therein. Issue I.B. is overruled.

Due Process and Equal Protection: Overt Act or Continuing Behavior Pattern

Appellants contend in issue I.C. that the Act violates due process and equal protection because, they say, the Act does not require a recent overt act or continuing pattern of behavior in order to establish dangerousness, in contrast to such a requirement in an ordinary civil commitment. The civil commitment statute referenced by appellants is Tex. Health & Safety Code Ann. § 574.034(d), (e) (Vernon Supp. 2003).

We reject the due process challenge to the Act. Although the Act does not require a "recent overt act," it does require that the person be a repeat sexual offender and have a behavioral abnormality that makes the person a menace to the health and safety of another person.

Equal protection does not require that all persons be dealt with identically, but it does require that a distinction have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107, 111, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966). In *Baxstrom*, the Court held that equal protection was violated where those committed at the end of prison terms were denied the right to a jury review as to whether they were mentally ill and in need of hospitalization. *Id.* The Court found, with respect to the issue of the right to a determination of those issues by a jury, no conceivable basis existed for distinguishing the commitment of a person who is nearing the end of a penal term from other civil commitments. *Id.*

The Act subjects to civil commitment those sexually violent predators who are about to be released after serving a term of incarceration. Incarceration significantly lowers the opportunity to commit an overt dangerous act or to be involved in a continuing pattern of dangerous behavior during the term of incarceration. The lack of recent overt acts or a continuing pattern of behavior during incarceration would not indicate lack of danger, but rather the fact of

incarceration. Moreover, the Act has its own provisions requiring the State to establish dangerousness justifying civil commitment. *See* Tex. Health & Safety Code Ann. §§ 841.002(2), (5),(6),(8), 841.003 (Vernon Supp. 2003). In establishing a person's "behavioral abnormality," the State must show that the person has a condition that predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person. *See* § 841.002(2). A menace is a threat or imminent danger. We conclude the distinction between the requirements to establish dangerousness under the Act, compared to an ordinary civil commitment proceeding, is rationally related to a legitimate governmental purpose. We overrule issue I.C.

**Due Process:
Inconsistency Between Required
Finding and Burden of Proof**

Appellants assert in issue I.D. that the Act violates due process because it does not require that the likelihood of future predatory acts of sexual violence be "imminent" or "substantial," and is therefore inconsistent with the "beyond a reasonable doubt" standard. Section 841.003 requires a finding that the person have a behavioral abnormality that makes the person "likely to engage in a predatory act of sexual violence." As we understand appellants' initial argument, it is that the use of the term "likely," while sufficient to describe the risk of harm when the burden of proof is by a preponderance of the evidence or by clear and convincing evidence, becomes insufficient when the burden of proof is beyond a reasonable doubt. Appellants also contend that the mere possibility or potential for harm is not serious enough to warrant a deprivation of liberty.

Appellants rely on the cases of *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996), *vacated*, 522 U.S. 1011 (1997); *In re Leon G.*, 26 P.3d 481 (Ariz. 2001), *vacated*, 122 S.Ct. 1535 (2002); *Westerheide v. State*, 767 So.2d 637, 652-53 (Fla. Dist. Ct. App. 2000), *review granted*, 786 So.2d 1192 (Fla. 2001); and *In re Tittlebach*, 754 N.E.2d 484 (Ill. App. 2001), as authority for their argument that a requirement of "highly likely" is required in order to achieve consistency with the "beyond a reasonable doubt" evidentiary standard. In *In re Linehan*, the Minnesota Supreme Court held that the due process clause of the United States Constitution and the Minnesota Constitution required that future harmful sexual conduct must be "highly likely" in order to commit a proposed patient under the state's Sexually Dangerous Persons Act. *See In re Linehan*, 557 N.W.2d at 180. The court placed

primary reliance on the case of *Addington v. Texas*, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). See *In re Linehan*, 557 N.W.2d at 180. In *Addington*, the United States Supreme Court stated that the "individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state[.]" and held that a burden of proof in mental health commitments of clear and convincing evidence satisfies due process. *Addington*, 441 U.S. at 427, 432. Under the Act at issue here, the burden of proof -- beyond a reasonable doubt -- is higher than the burden of proof required in *Addington*. And we see nothing in *Addington* to lead to the Minnesota court's conclusion that the finding of future dangerous conduct must be "highly likely," as opposed to "likely," in order to meet due process requirements. None of the other cases cited by appellants includes such a holding. The term "likely," as ordinarily defined, means "probable." Something that is probable is beyond a mere possibility or potential for harm. The "beyond a reasonable doubt" burden of proof is not inconsistent with the element that must be proven -- that the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.

Appellants urge that they may not be deprived of their liberty absent a showing of substantial threat or imminent risk of future harm. In support of this suggestion, they rely on the cases of *Lodge v. State*, 597 S.W.2d 773 (Tex. App.--San Antonio 1980), *aff'd on other grounds*, 608 S.W.2d 910 (Tex. 1980); *Taylor v. State*, 671 S.W.2d 535 (Tex. App.--Houston [1st Dist.] 1983, no writ); and *Broussard v. State*, 827 S.W.2d 619 (Tex. App.--Corpus Christi 1992, no writ). Before we review these cases, we note the Act by its terms does require proof of a behavioral abnormality, predisposing the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person. § 841.002(2). As we have noted, by definition a menace is a threat or imminent danger, and the menace described in the Act is substantial. In its own terms, the Act satisfies any proof requirement of a substantial threat or imminent risk of future harm.

In *Lodge*, the court reversed a judgment of commitment, because there was no evidence the appellant was in need of hospitalization for her own welfare and protection or the protection of others. *Lodge*, 597 S.W.2d at 779. Citing *Moss v. State*, 539 S.W.2d 936, 947-50 (Tex. Civ. App.--Dallas 1976, no writ), the *Lodge* court stated that the court in *Moss* "held that a mentally ill person could not be deprived of his liberty without a strong showing of a substantial threat of future harm founded on actual dangerous behavior manifested by some overt threat or act in the recent past" *Lodge*, 597 S.W.2d at 778. Actually, the court in *Moss* held that when an application for temporary hospitalization is opposed by the proposed patient, the order must be supported by the recommendation of a physician and a showing of the factual information upon which the

recommendation was based. *Moss*, 539 S.W.2d at 951. Our review of *Moss* does not reveal the holding for which it was cited in *Lodge*, nor can we find anywhere in *Lodge* where the court expressly adopted the holding.

In *Taylor*, the court held that "a person may not be deprived of his liberty by a temporary involuntary commitment unless there is a showing of a substantial threat of future harm to himself or others." *Taylor*, 671 S.W.2d at 538. In making this determination, the court relied on *Lodge* and *Seekins v. State*, 626 S.W.2d 97 (Tex. App.--Corpus Christi 1981, no writ). *Taylor*, 617 S.W.2d at 538. In *Seekins*, the court made the same finding, relying on *Lodge* and *Moss*. See *Seekins*, 626 S.W.2d at 99.

In *Broussard*, the court held that "bare psychiatric expert opinion" of a "potential danger" to others is insufficient to support a commitment, and that the State failed to sustain its burden of presenting evidence of a recent overt act or a continuing pattern of behavior that tended to confirm the likelihood of the deterioration of Broussard's ability to function. *Broussard*, 827 S.W.2d at 622. The court did not state there could be no commitment absent a showing of substantial threat or imminent risk of future harm.

It appears that the cases supporting appellants' contention -- that there must be a showing of substantial threat or imminent risk of future harm -- are based upon a misreading of the opinion in *Moss* by the court in *Lodge*. The Act by its own terms requires proof of danger sufficient to justify civil commitment. We decline to hold that the Constitution requires any additional or different finding of substantial threat or imminent risk of future harm. We overrule issue I.D.

Due Process and Equal Protection: Notice

Appellants urge in issue II.A. that the Act violates procedural due process because it does not require notice of the steps being taken against the person prior to the filing of the petition. Appellants cite *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir. Mass. 1973). The court in that case held that due process required that an inmate receive notice with respect to many early procedural steps. *Id.* at 1084. But here the process prior to the filing of a petition is still an administrative screening process and not yet adversary in nature. See generally *State v. Madary*, 133 N.W.2d 583, 590 (Neb. 1965); see also *In re Craft*, 109 A.2d 853, 855 (N.H. 1954). We respectfully decline to follow *Sarzen*. We hold due process does not mandate notice to the person sought to be committed of those preliminary procedures that precede the petition's filing, the beginning of adversary proceedings. See *Madary*, 133 N.W.2d at 590; *In re Craft*, 109 A.2d at 855.

Appellants also argue that steps taken without notice prior to the initiation of formal proceedings violate equal protection. But the purpose of the preliminary process prior to the initiation of formal adversary proceedings under the Act is to determine which cases should go forward to formal adversary proceedings and which should not. Unlike persons subject to ordinary civil commitment, those possibly subject to commitment under the Act are known to and in the custody of the State prior to the initiation of the formal adversary proceedings. *See* Tex. Health & Safety Code Ann. § 841.021(a) (Vernon Supp. 2003). This difference constitutes a rational basis for screening procedures prior to formal adversary proceedings under the Act, while no similar procedures are available with respect to those subject to ordinary civil commitment. Appellants make no contention that those subject to the Act do not receive the same notice as those subject to ordinary civil commitment with respect to matters occurring after the initiation of formal adversary proceedings. We conclude that the failure to give notice to those subject to the Act of procedures that occur prior to the initiation of formal adversary proceedings does not violate equal protection. We overrule issue II.A.

**Right to Counsel:
Psychiatric Examination
Prior to Adversarial Judicial Proceedings**

Appellants assert in issue II.B. that the Act violates procedural due process because it does not provide for a court-ordered examination with the right to counsel, as provided to targets for commitment under the Texas Mental Health Code. Appellants refer to the expert examination that occurs prior to the filing of a petition alleging that the person sought to be committed is a sexually violent predator.

Generally, the right to counsel arises upon the initiation of adversary judicial proceedings. *See Michigan v. Jackson*, 475 U.S. 625, 629 n.3, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) (Sixth Amendment); *Griffith v. State*, 55 S.W.3d 598, 603-604 (Tex. Crim. App. 2001). Relying on *Ex parte Ullmann*, 616 S.W.2d 278 (Tex. App.--San Antonio 1981, writ. dismissed), appellants assert that a proposed patient has the right to effective assistance of counsel at all significant stages of the commitment process. However, nothing in *Ullmann* suggests that the right attaches prior to the initiation of formal adversary proceedings. The filing of the petition is the step that initiates adversarial judicial proceedings. *See* Tex. Health & Safety Code Ann. §§ 841.041, 841.061. (Vernon Supp. 2003). We hold that the lack of counsel prior to the initiation of adversary judicial proceedings does not violate due process.

Appellants argue that the statute's failure to require that counsel be provided prior to adversary judicial proceedings denies them their right to equal protection,

because those who are subject to ordinary mental health commitments are afforded counsel prior to an examination. The purpose of the initial examination under the Act is to determine which cases should go forward and which should not. These examinations prior to formal adversary judicial proceedings are possible because those subject to the Act are incarcerated in the Texas Department of Criminal Justice ("TDCJ"), or committed to the Texas Department of Mental Health and Mental Retardation ("MHMR") at the time of the examination. Tex. Health & Safety Code Ann. § 841.023) (Vernon Supp. 2003). The examination saves the State the expense of formal proceedings against those an examination shows are not proper subjects for proceedings, while also protecting the incarcerated individual who is found not to be a proper subject of formal adversary proceedings. On the other hand, similar examinations are not practical in ordinary commitment proceedings because the proposed patient is not ordinarily or necessarily in custody before the initiation of formal adversary proceedings. A rational basis exists for the distinction between the two statutes; the distinction is rationally related to a legitimate governmental purpose.

Relying on *Lanett v. State*, 750 S.W.2d 302 (Tex. App.--Dallas 1988, writ denied), appellants also urge they must be informed of their right to counsel prior to submitting to a psychiatric examination. In *Lanett*, the psychiatric examination was held subsequent to the initiation of adversary proceedings, whereas the examination complained of by appellants is held prior to the initiation of adversary proceedings. *Id.* at 305-06. We overrule issue II.B.

Due Process and Separation of Powers: Multidisciplinary Team

Appellants argue in issue II.C. that section 841.022 violates due process and the separation of powers doctrine because it allows the Team, an interested and non-independent body, to usurp the function of the court by recommending the assessment of a person targeted for commitment. Section 841.022 of the Act establishes a Team that evaluates those whom the TDCJ or the MJMR has indicated are serving sentences for a sexually violent offense or are committed after being found not guilty by reason of insanity of such an offense and who may be repeat sexually violent offenders. *See* Tex. Health & Safety Code Ann. §§ 841.021(a), (b), 841.022 (Vernon Supp. 2003). The Team is to (1) determine whether the person is a repeat sexually violent offender and whether the person is likely to commit a sexually violent offense after release or discharge, (2) give notice to either TDCJ or MHMR, as appropriate, and (3) as appropriate, recommend the assessment of the person for a behavioral abnormality. *See* §

841.022. The Team is composed of two persons from MHMR, three persons from TDCJ (including one who must be from the victim services office of that department), one person from the Texas Department of Public Safety, and one person from the Interagency Council on Sex Offender Treatment. Tex. Health & Safety Code Ann. §§ 841.007, 841.022(a)(1)-(4) (Vernon Supp. 2003). After the Team has made a recommendation to either of the two departments, that department -- using an expert to examine the person -- is to determine whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. *See* § 841.023(a).

Appellants maintain that the Team's recommendation of persons for assessment is a crucial step in the process toward commitment. They argue that such an assessment should take place under the supervision and control of a court. They note that the pre-commitment examination in the ordinary mental health context takes place under a court's supervision and pursuant to court order. We interpret this portion of their argument as suggesting that the Act violates the right to due process and violates the separation of powers clause of the Texas Constitution by providing for an examination conducted by either the TDCJ or the MHMR prior to the initiation of formal adversarial proceedings. But we conclude that the initial assessment of who would be possible candidates for commitment under the Act is an administrative screening function, not a judicial function, and the fact that the assessment is conducted by one of the two departments, based in part upon an examination conducted pursuant to the Act, does not violate due process. If an adversary proceeding is actually filed, the statute provides a full array of due process protections.

Appellants suggest that agency Team members would have an "interest" in commitment of persons under the Act in order to create jobs and receive government funding for their agencies. Appellants cite no evidence or authority for this argument, or for the implication that members of the Team would fail to make a proper

screening assessment because they are government employees. We overrule issue II.C.

**Due Process:
Multidisciplinary Team Standard
For Assessment Recommendation**

Appellants assert in issue II.D. that section 841.022(c)(1) of the Act violates due process because it permits a Team recommendation for assessment under a standard that is broader than the standard for commitment under the Act. *See* Tex.

Health & Safety Code Ann. §§ 841.003, 841.022(c)(1), 840.023(a), 841.062(a) (Vernon Supp. 2003). Under the statutory procedure, TDCJ or MHMR gives notice to the Team of those persons (1) who are serving a sentence for a sexually violent offense, or of those who have been committed to MHMR after being adjudicated not guilty by reason of insanity of a sexually violent offense, and (2) who may be repeat sexually violent offenders. *See* § 841.021 (a),(b). The notice, among other things, is to include the assessment of the likelihood that the person will commit a sexually violent offense after release or discharge. *See* § 841.021(c). Thereafter, the Team determines whether the person is a repeat sexually violent offender and whether the person is likely to commit a sexually violent offense after release or discharge; gives notice of that determination to TDCJ or MHMR, as appropriate; and recommends the assessment of the person for a behavioral abnormality, as appropriate. *See* § 841.022(c). The assessment to be made is whether the person suffers from a behavioral abnormality that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense, to the extent that the person becomes a menace to the health and safety of another person. §§ 841.002(2), 841.022(c).

Appellants say this assessment is broader than the definitions of "sexually violent predator" and "predatory act" would allow. Appellants point out that those whose sexual violence is likely to be directed only toward family members, or others who do not fit within the definition of a "predatory act," do not appear subject to commitment under the express terms of the Act. The Act defines a "predatory act" as an act committed for the purpose of victimization that is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the purpose of victimization. *See* § 841.002(5). Under the statutory scheme, the Team determines whether to recommend for assessment for behavioral abnormality those repeat sexual offenders who are likely to commit a sexually violent offense after release or discharge. *See* §§ 841.003(b), 841.022(c). Either the TDCJ or MHMR, whichever is appropriate, then determines, with the assistance of an expert, whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. *See* § 841.023.

We agree with appellants' assumption that some of those who are initially chosen for assessment possibly may not be subject to commitment under the Act because the assessment will determine they are not likely to engage in an act of predatory sexual violence, as defined in the Act. But that is the main function of the procedure -- to determine who is subject to commitment proceedings. We see nothing about this screening procedure -- the purpose of which is to determine who might be subject to commitment and who is not -- that violates due process. Other than pointing out that the initial group of those recommended for assessment

is broader than those subsequently determined to be subject to commitment under the terms of the Act, appellants present no argument as to why this violates due process, nor do they present any authority in support of their contention. We overrule issue II.D.

Due Process and Equal Protection: Use of Expert Testimony

Appellants assert in issue II.E. that section 841.023(a) of the Act violates due process and equal protection because it allows for the use of pre-Act testing in making a clinical assessment and does not require that an expert's clinical assessment be based upon recent testing. The section to which appellants refer requires TDCJ or MHMR to determine, after receiving a recommendation for assessment from the Team, whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. *See* § 841.023(a). The assessing department (either TDCJ or MHMR) uses an expert to examine the person and make a clinical assessment based upon testing for psychopathy, a clinical interview, and other appropriate assessments and techniques. *Id.* Appellants argue that this section violates due process because it allows for the use of pre-Act testing in making the clinical assessment -- testing that appellants claim was conducted in violation of their due process right to notice. Due process does not require an impossibility -- namely, the giving of notice of something not in existence. Pre-Act testing may be used as data in the adversary proceeding, or as part of the screening mechanism, without violating due process.

Appellants also argue that section 841.023(a) violates equal protection because persons subject to commitment under the Act are denied the right to a psychiatric examination that is conducted near the time of their commitment hearing; they note that section 574.009 of the Texas Health and Safety Code requires that an examination must have occurred within thirty days preceding the hearing. Section 574.009 relates to certificates of medical examination that must be on file before a hearing may be held in an ordinary commitment proceeding. Tex. Health & Safety Code Ann. § 574.009(a) (Vernon Supp. 2003). This section requires that physicians filing such certificates must have examined the proposed patient within thirty days. *Id.* As we read the statute, however, it does not appear to require that those physicians must have examined the proposed patient within thirty days of the hearing; rather it appears to require that they have examined the proposed patient within thirty days preceding the execution of the certificates.

Nevertheless, appellants fail to note that section 841.061 of the Act provides that a trial must be held not later than sixty days after a petition is filed alleging that the person is a sexually violent predator. *See* § 841.061. The Act provides that after the filing of the petition the person and the State are entitled to an immediate examination of the person by an expert. *Id.* Appellants are not denied the right to an expert examination conducted near the time of their commitment hearing; the Act expressly provides that right. The appellants present no authority in support of their argument. We overrule issue II.E.

Open Meetings Act

Appellants contend in issue II.F. that the Team's meetings are in violation of the Texas Open Meetings Act. The Open Meetings Act is applicable if the following five prerequisites are met:

- the body must be an entity within the executive or legislative department of the state;
- the entity must be under the control of one or more elected or appointed members;
- the meeting must involve formal action or deliberation between a quorum of members;
- the discussion or action must involve public business or public policy; and
- the entity must have supervision or control over that public business or policy.

Gulf Reg'l Educ. Television Affiliates v. Univ. of Houston, 746 S.W.2d 803, 809-10 (Tex. App.--Houston [14th Dist.] 1988, writ denied); *see also* Tex. Gov't Code Ann. §§ 551.001(4), 551.002 (Vernon 1994 & Supp. 2003).

The Team is subject to or controlled by a subsequent assessment made by the custodial agency, and this assessment is subject to or controlled by the discretion of the attorney for the State who decides whether to file suit to seek civil commitment. *See* Tex. Health & Safety Code Ann. §§ 841.022, 841.023, 841.041 (Vernon Supp. 2003). A review of the statute reveals the Team's role is that of a screening mechanism, not a final arbiter of whether the person is a sexually violent predator. *See* §§ 841.022, 841.023. After receiving the Team's "determination" as to whether the person is likely to commit a sexually violent offense after release or discharge and its recommendation regarding the "assessment" of the person for a behavioral abnormality, TDCJ or MHMR then makes an independent assessment. *See* § 841.023. The determination to be made is whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence. *Id.* If the department concludes the person suffers from this

abnormality, the department gives notice of that determination to the attorney representing the State. *Id.* The State's attorney is then free to make a determination as to which of the referrals will be taken to court for commitment proceedings. *See* § 841.041. The procedural steps outlined by the statute illustrate the Team's lack of ultimate supervision or control over public business or policy.

Appellants contend that, absent a recommendation from the Team, neither TDCJ nor MHMR is free to make a "determination." *See* §§ 841.022, 841.023. Even so, the Team's screening review of confidential records is not the type of supervision or control over public business or policy intended to be governed by the Open Meetings Act. Essentially, the function of the Team is to review records concerning the person and make an initial screening recommendation. *See* § 841.022. The statute implicitly recognizes that some of the records will be confidential by requiring any entity that possesses relevant records to release the information for review "to an entity charged with making a determination under this chapter," "regardless of whether the information is otherwise confidential." *See* Tex. Health & Safety Code Ann. § 841.142(a),(e) (Vernon Supp. 2003). Consent of the person is not required for the release. *See* § 841.142(e). Though confidential information is released to and exchanged among appropriate entities, nothing in the statute suggests that the confidential information is to lose its confidential status simply because the records are under review by the Team. Undeniably, the statute facilitates the Team's screening and review of confidential records, but it does not abrogate the records' confidential status or alter the Team's function of preliminary screening and review. *See generally* § 841.142. Subjecting the Team to the Open Meetings Act requirements would conflict with the Team's screening function of reviewing potentially confidential records and recommending further assessment of cases for litigation.

Because the Team does not have ultimate supervision or control over the determination of whether to file a petition, and because its function does not fall within the confines of public business and policy, we hold the Team's meetings are not in violation of the Open Meetings Act. Issue II.F. is overruled.

Nature of Proceeding

Appellants urge in issue III that the Act is punitive rather than civil, and therefore unconstitutional, because it does not afford procedural due process rights, including the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel, and because it violates the prohibitions against double jeopardy and *ex post facto* law.

The Texas legislature placed the Act in the Health & Safety Code and labeled it as a civil commitment procedure. *See* § 841.001. While a civil label is not always

determinative of the issue, we will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. *Hendricks*, 521 U.S. at 361. In determining whether a statute is punitive, factors that may be considered include whether the sanction involves an affirmative disability or restraint; whether it has historically been regarded as punishment; whether it comes into play only on a finding of *scienter*; whether its operation will promote the traditional aims of punishment -- retribution and deterrence; whether the behavior to which it applies is already a crime; whether an alternative purpose to which it may rationally be connected is assignable for it; and whether it appears excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

The Act imposes certain restraints upon those found to be sexually violent predators, including outpatient treatment and other conditions similar to those imposed in community supervision. Tex. Health & Safety Code Ann. §§ 841.082, 841.083 (Vernon Supp. 2003). However, such restraints in the context of involuntary civil commitments have historically been treated as civil, not punitive. *Hendricks*, 521 U.S. at 363. Commitment under the Act involves no finding of *scienter*. It does not involve retribution because it does not fix culpability for prior criminal conduct; rather, the Act addresses what it describes as a "menace" -- a threat. *Id.* at 362. A person committed under the Act has a behavioral abnormality, a congenital or acquired condition that, by affecting the person's emotional or volitional capacity, predisposes the person to commit a sexually violent offense. *See* §§ 841.002(2), 841.003(a); *Hendricks*, 521 U.S. at 362-63. The acts that lead the person to initially qualify for the status of "sexually violent predator" are crimes. But the statutory scheme of the treatment and supervision -- for the purpose of avoiding the menace posed by an untreated, unsupervised person with the defined behavioral abnormality -- is not excessive in relation to that purpose. We conclude that, on balance, these factors do not show by clearest proof the Act is punitive in nature.

Appellants also argue the Act is punitive because one may be committed without a showing by the State of a "mental" condition. We have already discussed this contention. Although "behavioral abnormality" is not expressly labeled a "mental" condition, the Act's definition of "behavioral abnormality" is virtually the same as the Kansas statute's definition of "mental abnormality" upheld by the Supreme Court in *Hendricks*, 521 U.S. 346.

Appellants further argue the Act is punitive because it provides that a violation of requirements of commitment is a third degree felony. *See* Tex. Health & Safety Code Ann. § 841.085 (Vernon Supp. 2003). Appellants insist this provision

promotes retribution because a predator who is unable to control behavior is doomed to fail, and there is no inpatient alternative. Further, they suggest that the State, by this provision, achieves an underlying goal of permanent incarceration of the socially unacceptable sex offender. But rather than promoting permanent incarceration of sex offenders, the Act on its face maintains the offenders in the community while imposing on the persons certain requirements to minimize -- for the benefit of both the offenders and the public -- the opportunity for the offenders to commit new offenses after commitment. *See* Tex. Health & Safety Code Ann. § 841.081 (Vernon Supp. 2003) (providing for outpatient treatment, not inpatient treatment); *see* § 841.082.

Appellants have failed to present the clearest proof that the statutory scheme is punitive in purpose or effect. Because we conclude the Act is civil and not punitive, we reject appellants' Fifth Amendment, Sixth Amendment, double jeopardy and *ex post facto* law arguments as presented here. We overrule issue III.

Due Process and Separation of Powers:

Criminal Penalty

Appellants assert in issue IV.A. that (1) section 841.085 of the Act is unconstitutionally vague and violates the separation of powers doctrine when read in conjunction with section 841.082(9), and (2) that it violates due process because it criminalizes failure to comply with outpatient treatment and supervision requirements without regard to whether such failure is volitional or due to a mental condition. *See* Tex. Health & Safety Code Ann. §§ 841.082(9), 841.085 (Vernon Supp. 2003). Appellants assert that the provision authorizing a third degree felony punishment for a violation of a commitment requirement violates the separation of powers provisions of the United States and Texas Constitutions because a judge may impose any requirement the judge deems necessary; therefore, appellants argue, the Act confers upon the judge the power to create a third degree felony.

Appellants cite no authority indicating that the separation of powers doctrine, derived from the United States Constitution and relating to the division of power among the three branches of the federal government, has any application to division of powers among the three departments of state government. We consider their argument to be under the Texas Constitution. Article II, Section 1 of the Texas Constitution provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Tex. Const. art. II, § 1. The power to pass laws and to revise the criminal law of Texas is vested in the legislature. Tex. Const. art. III, §§ 30, 43.

We conclude the legislature has not delegated its legislative power to create third degree felonies to the trial courts. Rather, the legislature has authorized the trial courts to order requirements necessary to ensure the compliance of the committed person with treatment and supervision and to protect the community. *See* § 841.082. It is the legislature that has determined that violations of any of the statutory requirements, including those necessary requirements specified by the judge, are third degree felonies. *See* § 841.085.

The appellants contend that because judges would differ in the requirements they might impose, the Act is unconstitutionally vague, uncertain, and indefinite; appellants cite *Sanders v. State Dep't of Pub. Welfare*, 472 S.W.2d 179, 182 (Tex. App.--Corpus Christi 1971, writ dism'd w.o.j.). In *Sanders*, the court held that the use of the term "old," such as in the term "old debt" in a welfare regulation, was vague, uncertain, and indefinite. The court noted that different employees of the State Welfare Department could interpret the use of the term in different ways. *Id.* at 182. The court stated that "[i]f a regulation is incomplete, vague, indefinite and uncertain and it forbids the doing of an act which is so vague, that men of common intelligence must necessarily guess at its meaning and that such men differ as to application, it violates the first essential of due process of law." *Id.* However, that different judges might establish different specific requirements does not render those requirements necessarily vague after they are issued and subject to compliance.

Appellants argue that the right of the trial court to establish requirements of commitment as authorized by § 841.082(a)(9), when taken together with the criminal penalty in § 841.085 for violating a requirement, renders those sections vague and overbroad. We have concluded that the statutory requirement, to follow the court's specific orders which are necessary to ensure compliance with treatment and supervision and to protect the community, is not vague. As to the appellants' contention that the sections are unconstitutionally overbroad, the appellants offer no argument nor any authority in support of that contention.

Consequently, nothing is presented for review with respect to that contention. Tex. R. App. P. 38.1(h); *Kunze*, 996 S.W.2d at 423.

Appellants also contend, in two sentences under this issue, that the criminal penalty provision of section 841.085 violates due process because it criminalizes failure to comply with requirements for commitment on an outpatient basis without regard to whether the failure to comply is the result of volitional conduct or of a mental condition that renders one incapable of controlling conduct. Appellants fail to distinguish between the ability to comply with specific commitment requirements and a predisposition to commit sexually violent offenses. Appellants cite no authority for their argument other than *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972), where the Court held that the State had no basis for holding McNeil in a mental hospital. He had been held there for six years on the authority of an *ex parte* order for a psychiatric interview to determine if he should be committed after he had completed serving an underlying criminal sentence, which had expired. *Id.* 407 U.S. at 250-51. Our decision is not inconsistent with that holding. We overrule issue IV.A.

Fifth Amendment Privilege against Self Incrimination

Appellants urge in issue IV.B. that sections 841.082(a)(8) and 841.083(a) of the Act violate the Fifth Amendment privilege against self-incrimination. Section 841.082(a)(8) establishes the requirement that the person committed notify the case manager within forty-eight hours of any change in status that affects proper treatment and supervision, including a change in the person's physical health or job status and including any incarceration of the person. *See* § 841.082(a)(8). Section 841.083(a) provides that a treatment plan for a committed person may include the monitoring of the person with a polygraph or plethysmograph. *See* § 841.083(a). Appellants suggest that any information reported to the case manager or derived from the results of a polygraph or plethysmograph could be used against the committed person in a subsequent criminal proceeding.

Nothing in either statute requires the giving of incriminating evidence in violation of the person's rights under the Fifth Amendment of the United States Constitution. Inasmuch as the appellants' challenge to the Act with respect to this issue is that it is facially unconstitutional, their challenge must fail. Should the provisions of the Act be used to elicit incriminating information in violation of the person's Fifth Amendment privilege against self incrimination, it would be necessary to contend that the Act is unconstitutional as applied, not that the Act is facially unconstitutional. *See generally Ex parte Renfro*, 999 S.W.2d 557, 561

(Tex. App.--Houston [14th Dist.] 1999, pet. ref'd) (the mere requirement as a condition of community supervision that one take a polygraph examination is insufficient to constitute an infringement of the privilege against self-incrimination). Issue IV.B. is overruled.

Due Process and Equal Protection:

Right to Hearing with Burden Of Proof on State

In issue IV.C., appellants contend section 841.102 violates due process and equal protection because it fails to provide for a periodic redetermination that places the burden of proof upon the State. *See* Tex. Health & Safety Code Ann. § 841.102 (Vernon Supp. 2003). In raising this constitutional challenge, appellants focus narrowly on the single section and ignore the considerable substantive and procedural safeguards that characterize the Act from the initial commitment onward.

The biennial review provided for in section 841.102 must be considered in the context of the overall statutory scheme. The Act provides for initial screening and review by a Team, referral of the Team's assessment to either TDCJ or MHMR for review and assessment, and referral to the State's attorney for further review before a petition for commitment is filed. In the commitment proceeding, the person is afforded an expert examination, an attorney, and a jury trial at which the State has the burden of proving beyond a reasonable doubt that the person is a sexually violent predator. *See* Tex. Health & Safety Code Ann. §§ 841.005, 841.023(a), 841.061, 841.062 (Vernon Supp. 2003). A finding of sexually violent predator status means in part that the person has a behavioral abnormality which predisposes the person to commit a sexually violent offense, to the extent that the person is a menace to the health and safety of another person. *See* §§ 841.002(2), 841.003(a).

Once the person is determined by a judge or jury to have predator status, the person is committed for outpatient treatment and supervision. *See* Tex. Health & Safety Code Ann. § 841.081 (Vernon Supp. 2003). The person's outpatient commitment continues until the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence. *Id.* The Act provides for mandatory periodic review of the person's status. *See* Tex. Health & Safety Code Ann. §§ 841.101, 841.102 (Vernon Supp. 2003). An expert contracted for by the State performs a biennial examination on the person. § 841.101. A case manager provides a report of the biennial examination to the judge. § 841.101(b). The report must include an assessment of

whether the requirements imposed on the person under Chapter 841 should be modified and whether the person should be released from all requirements. *Id.* Following the biennial examination, the judge must conduct a biennial review of the person's status. § 841.102(a). At the biennial review, the person is entitled to be represented by counsel, though the person is not entitled to be present. § 841.102(b). If the judge determines at the review that (1) a requirement imposed on the person under Chapter 841 should be modified, or (2) probable cause exists to believe that the person's behavioral abnormality has changed to the extent the person is no longer likely to engage in a predatory act of sexual violence, then the judge must set a hearing. § 841.102(c). During the hearing process, the person is entitled to representation by counsel, examination by an expert, and a jury trial. *See* Tex. Health & Safety Code Ann. §§ 841.102; 841.103 (Vernon Supp. 2003). At the trial, the State has the burden to prove beyond a reasonable doubt that the person's behavioral abnormality has not changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence. § 841.103(c).

In addition to the biennial review, the Act provides that the case manager must annually give the person written notice of the person's right to file with the court, even without the case manager's authorization, a petition for release. *See* Tex. Health & Safety Code Ann. §§ 841.122 (Vernon Supp. 2003). A person may file a petition for release at any time. *See* Tex. Health & Safety Code Ann. § 841.006 (Vernon Supp. 2003). However, various restrictions are placed upon that right, including, among others, automatic denial of the petition should the trial judge determine it is frivolous. *See* Tex. Health & Safety Code Ann. § 841.123 (Vernon Supp. 2003). The judge is required to deny an unauthorized petition unless the judge finds that probable cause exists that the petitioner's behavioral abnormality has changed to the extent that the person is not likely to engage in a predatory act of sexual violence. § 841.123(d). If the judge does not deny the petition, the person is entitled to a jury trial with the burden of proof on the State and the other protections described in the statute. § 841.124.

We turn first to appellant's procedural due process challenge to the biennial review provision. A procedural due process analysis proceeds in two steps. First, a liberty or property interest must be involved. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The civil commitment of a person as a sexual predator is a significant deprivation of liberty to which procedural due process protections apply. *Vitek v. Jones*, 445 U.S. 480, 491-92, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). The second step involves the consideration of whether the utilized procedures satisfy due process. The analysis involves balancing (1) the private interest affected; (2) the risk of an erroneous deprivation of that interest and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the burdens

that additional procedural requirements would place on the State. *Mathews*, 424 U.S. at 335.

Although a person's interest in being free from confinement is substantial and the harm the person would suffer from an erroneous determination is great, those interests are adequately protected by the procedures afforded in the statute. The person has been found beyond a reasonable doubt to be a sexually violent predator in a trial by jury (if the person chooses to have a jury) with all its inherent procedural protections. *See* §§ 841.061, 841.062. The biennial examination is done by an expert contracted for by the State, and a report on the examination is submitted to the judge. § 841.101. The person is entitled to be represented by counsel at the biennial review and may have his or her own expert. *See* Tex. Health & Safety Code Ann. §§ 841.102, 841.103, 841.144, 841.145 (Vernon Supp. 2003). In making the probable cause determination, the trial judge has access to the report and the person's counsel. The Supreme Court has said often that "due process is flexible and calls for such procedural protections as the particular situation demands." *See Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed 2d 484 (1972). The procedures in the biennial review are adequate to protect the person's liberty interests; and the government's interest in protecting the public from sexually violent predators is significant. *See generally United States v. Wattleton*, 296 F.3d 1184 (11th Cir. 2002)(placing burden of proof to show change of condition on defendant insanity acquittee not a denial of due process).

Appellants' substantive due process challenge also fails. Substantive due process bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). But it is not arbitrary or wrongful and not a substantive due process violation to commit a person who is found to be a sexually violent predator. *See generally Hendricks*, 521 U.S. at 356-57.

Appellants also challenge section 841.102 on equal protection grounds. *See* U.S. Const. amend. XIV. They point out that under Chapter 574 of the Texas Mental Health Code a person found to be mentally ill and requiring court-ordered extended mental health services must be afforded an annual judicial hearing, with a jury trial if requested, to determine if a person continues to meet the Mental Health Code's criteria for commitment. *See* Tex. Health & Safety Code Ann. §§ 574.035(a), (b)(2), 574.066(e) (Vernon 1992 & Supp. 2003). At the renewal hearing under the Mental Health Code, the State has the burden to prove each element of the applicable criteria by clear and convincing evidence. *See* Tex. Health & Safety Code Ann. § 574.031(g) (Vernon Supp. 2003).

In contrast, the trial judge at the biennial review hearing under the Act is authorized to set a hearing only if the judge finds (i) there should be a

modification in the requirements imposed on the person or (ii) probable cause exists to believe the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence. § 841.102. If a hearing is set to determine the issue of release, then the State has the burden to prove beyond a reasonable doubt, to a jury if requested, the commitment criteria continues. § 841.103. Appellants argue the Act's failure to allocate the burden of proof to the State in the probable cause biennial review constitutes an equal protection violation.

Appellants direct us to two Supreme Court cases -- *Baxstrom*, 383 U.S. 107 and *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972). Neither case is directly applicable here. In *Baxstrom*, the Court held that the State of New York violated a committed person's right to equal protection when it afforded a person civilly committed the right to a jury determination as to his sanity, while denying such right to a person committed at the expiration of a prison term. *Baxstrom*, 383 U.S. at 110-12. In *Baxstrom*, the defendant was civilly committed at the expiration of his penal sentence without a jury review. *Humphrey* also involved a defendant who had been convicted and, in lieu of sentence, was committed to the sexual deviate facility for a period equal to the maximum sentence authorized for the crime -- in his case one year. After the end of that term, under the Wisconsin statutory scheme, the department could petition for a renewal of the commitment. Relying on *Baxstrom*, the Court in *Humphrey* held that the State's accordance of the right of a jury trial to those under ordinary civil commitment, but the denial of a jury trial to those involved in renewal proceedings under Wisconsin's Sex Crimes Act, violated the right of equal protection of those committed under the provisions of the Sex Crimes Act. *Humphrey*, 405 U.S. at 510-12. But a sexually violent predator under the Texas statute is not similarly situated to either *Baxstrom* or *Humphrey*. Whereas at the end of their terms those defendants were not accorded a jury trial in a civil commitment proceeding, Texas defendants are accorded such a right under the Act.

In an equal protection analysis, we must first decide whether the statutory scheme interferes with a fundamental right or discriminates against a suspect class. *See Kadrmas*, 487 U.S. at 458. *See In re M.A.H.*, 20 S.W.3d at 866. The statute does not discriminate against a suspect class. We have held the Texas Act satisfies constitutional due process concerns, and no fundamental liberty right is abridged without due process. Under these circumstances, to satisfy equal protection the provision must be rationally related to a legitimate governmental purpose. *See, e.g., Kadrmas*, 487 U.S. at 457-58. We conclude the disparate treatment of sexually violent predators under the Act and persons under the Texas Mental Health Code does not violate equal protection.

The legislature stated the rationale behind the enactment of Chapter 841 in the first section of the Act, which we quote at the beginning of this opinion. Section 841.001 expressly states why the involuntary commitment provisions of the Texas Mental Health Code are unworkable for sexually violent predators. The Supreme Court has observed more than once that when the legislature acts in areas of medical or scientific uncertainty, courts must be cautious not to rewrite legislation. *See Jones v. United States*, 463 U.S. 354, 370, 103 S.Ct. 3043, 77 L.Ed 2d 694 (1983). Further, those attacking the rationality of a legislative classification have the burden to negate every conceivable basis which might support it. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Though appellants have voiced an equal protection challenge, they have not attacked the bases set out by the legislature in the statute, or any other conceivable bases. They do not allege that sexually violent predators are a suspect class, subject to heightened scrutiny, or allege, if such persons are not a suspect class, why section 841.102 does not meet the rational basis test. Appellants have not met their burden to show a denial of equal protection under the law.

Nonetheless, we find the bases, as stated, to be adequate to survive an equal protection challenge. Under the Act, commitment is indefinite in length. Release because of a change of condition claimed upon biennial review or as the result of an unauthorized petition initially is reasonably restricted by the statutory requirement that probable cause must exist for a redetermination of the condition. *See* Tex. Health & Safety Code Ann. §§ 841.102, 841.121, 841.123 (Vernon Supp. 2003). A petition that is groundless on its face does not require a redetermination. § 841.123. Were we to hold otherwise, we would be requiring continuous repetitive trials of conditions already determined and unchanged. Given the legislative findings that (a) predators have a behavioral abnormality not amenable to traditional mental illness treatment and a need for long term supervision and treatment, (b) the involuntary commitment provisions under the Texas Mental Health Code are inadequate to address the risk of sexual predators to society, and (c) there are differences in effective supervision and treatment between the two classifications, we find the differences in the statutory schemes are rationally related to a legitimate government purpose.

At different points in the commitment process, as illustrated above, Chapter 841 provides a person considerable protection, including counsel, experts, jury trial, judicial review, and treatment. *See* Tex. Health & Safety Code Ann. §§ 841.005, 841.006, 841.023, 841.061, 841.083, 841.101-02, 841.121-24, 841.144, 841.145, 841.146 (Vernon Supp. 2003). We hold that the statutory requirement that at the biennial review the judge must make a probable cause finding before the person is entitled to a hearing (where the statute expressly places the burden of proof on the State) is not a denial of equal protection or due process. Issue IV.C. is overruled.

The judgment of the trial court is AFFIRMED.

DAVID B. GAULTNEY

Justice

Submitted on August 22, 2002

Opinion Delivered December 19, 2002

Publish

Before Walker, C.J., Burgess and Gaultney, JJ.

DISSENTING OPINION

I respectfully dissent in several aspects, most vigorously to that portion which upholds the criminal penalties. I concur in all other aspects.

DUE PROCESS AND SEPARATION OF POWERS:

CRIMINAL PENALTY

Appellants assert in issue IV.A. that section 841.085 of the Act⁽²⁾, when read in conjunction with section 841.082(a)⁽³⁾, violates the separation of powers doctrine and is unconstitutionally vague. As part of their argument, they assert the provision authorizing a third degree felony offense for a violation of a commitment requirement violates the separation of powers provisions of the Texas Constitution because, since a judge may impose any requirement deemed necessary, it confers upon the judge the power to create a third degree felony.

The majority acknowledges that Article II, Section 1 of the Texas Constitution provides for three distinct and separate branches of government and Art. III, §§ 30, 43 vest the power to pass laws and to revise the criminal law of the State in the legislature. The majority concludes the legislature has not delegated its power to the trial courts to create third degree felonies, but rather has authorized the trial courts to determine requirements that are necessary to ensure the compliance of the person committed with treatment and supervision and to protect the community. They further conclude it is the legislature, not the judge, that has determined that any of the statutory requirements, as well as those necessary requirements set by the judge, are third degree felonies. They miss the point.

To better illustrate the issue, this is the statute, as combined: A person commits a felony of the third degree if the person violates the legislative requirements imposed under Section 841.082(a)(1-8) or any other requirement determined necessary by the judge under Section 841.082(a)(9). That the legislature determined eight specific requirements should be imposed on persons committed under the Act is a clear indication of its legislative prerogative, duty and power to prescribe what requirements or violations thereof would be criminalized. However, the legislature crossed the constitutional line when it criminalized "any other requirements determined necessary by the judge." This is simply a delegation of its authority to expand the eight enumerated requirements. As a rose is still a rose by any other name, section 841.082(a)(9) is a delegation of authority by any analysis. Therefore, I am constrained to conclude that section 841.082(a)(9) of the Act is unconstitutional under the separation of powers provision of the Texas Constitution because it involves the unconstitutional delegation of legislative power to the judiciary.

Appellants also contend the combination of sections 841.085 and 841.082(a)(9) is unconstitutionally void for vagueness and overbroad. The majority, in its analysis, states: "[T]hat different judges might establish different specific requirements does not render those requirements necessarily vague after they are issued and subject to compliance." Again, the majority misses the point. Appellants do not argue that a particular requirement imposed by a judge under 841.082(a)(9)—⁽⁴⁾ is unconstitutionally vague; rather they argue the statute, as written, is unconstitutionally vague because it criminalizes unknown conduct on its face. A statute is unconstitutionally vague if it (1) does not give fair notice of what conduct may be punished, and (2) invites arbitrary and discriminatory enforcement by its lack of guidance for those charged with its enforcement. *Rooms With a View, Inc. v. Private Nat. Mortg. Ass'n, Inc.*, 7 S.W.3d 840, 845 (Tex. App.--Austin 1999, pet. denied) (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). Clearly, it would be unconstitutional for the Legislature to pass a statute stating: "A person commits a felony of the third degree if the person violates any requirement determined

necessary by the legislature." Just as clearly, the Legislature can not criminalize conduct that is defined only as "any other requirements determined necessary by the judge" because this does not give fair notice of what conduct may be punished. Accordingly, I would hold section 841.082(a)(9) is unconstitutional under the void for vagueness doctrine.

The majority does not address the overbreadth issue. Having decided the vagueness issue in favor of appellants, the overbreadth issue would grant no additional relief, so it is unnecessary for me to consider. ⁽⁵⁾ I would sustain issue IV.A.

OPEN MEETINGS ACT

The appellants contend in issue II.F. that the multidisciplinary team's meetings are in violation of the Texas Open Meetings Act. The majority correctly recites the five prerequisites of The Texas Open Meetings Act citing *Gulf Reg'l Educ. Television Affiliates v. Univ. of Houston*, 746 S.W.2d 803, 809-10 (Tex. App.--Houston [14th Dist.] 1988, writ denied).

Under the record, it is clear to me that the multidisciplinary team is an entity within the executive department of the State; it is under the control of one or more appointed members; its meetings involve formal action or deliberation between a quorum of members; its discussion or actions involve public business; and it has supervision or control over that public business. Consequently, the multidisciplinary team is subject to the Texas Open Meetings Act.

The majority concludes the multidisciplinary team "is subject to or controlled by a subsequent assessment made by the custodial agency, and this assessment is subject to or controlled by the discretion of the attorney for the State who decides whether to file suit to seek civil commitment." It is true that the Texas Department of Criminal Justice or the Texas Department of Mental Health and Mental Retardation, after receiving from the multidisciplinary team its determination as to whether the person is likely to commit a sexually violent offense after release or discharge and its recommendation as to assessment of the person for a behavioral abnormality, makes an independent determination as to whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence before referring the person to the State's attorney. Tex. Health & Safety Code Ann. § 841.023. It is also true that the State's attorney is then free to make his or her own determination as to which of those referred persons will be taken to court for commitment proceedings. *Id.* § 841.041. However, it also appears that neither the Texas Department of Criminal Justice nor the Texas Department of Mental Health and Mental Retardation is free to make a determination as to whether the person suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence absent a

recommendation from the multidisciplinary team that the person be assessed. *Id.* § 841.023. Consequently, while the two departments have the ultimate determination as to who, among those whom the multidisciplinary team recommends for assessment, are persons who suffer from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence, and while the State's attorney has discretion of which of those persons to seek to commit, the multidisciplinary team's decisions not to recommend that a person be assessed for a behavioral abnormality is not subject to or controlled either by the two departments or by the State's attorney. I know of no provision that permits either of the two departments to assess a person when such an assessment has not been recommended by the multidisciplinary team, nor do I know of any provision that would permit the attorney for the State to seek commitment under the Act when the multidisciplinary team has not recommended assessment.

The trial court, in its findings of fact, expressed privacy concerns as a reason why the multidisciplinary team should not be required to meet openly. I share those concerns. However, I cannot agree with the majority, that the multidisciplinary team does not fit within the definition of those governmental bodies that fall within the requirements of the Texas Open Meetings statute. I would sustain issue II.F.

DUE PROCESS AND EQUAL PROTECTION: RIGHT TO HEARING WITH BURDEN OF PROOF ON STATE

The appellants urge in issue IV.C. that § 841.102 of the Act violates due process and equal protection because it does not provide for periodic redetermination that the person continues to meet the standard for commitment, in a judicial hearing with the burden of proof upon the State. The majority correctly sets out the procedures after commitment.

In Texas, those who are subject to ordinary civil commitments are entitled to a hearing prior to an order for an extension of their commitment. Tex. Health & Safety Code Ann. § 574.066(e) (Vernon 1992). An application for which a hearing is requested or set is considered an original application for court-ordered extended mental health services. *Id.*

At a hearing on an original application for court-ordered extended outpatient mental health services, the proposed patient has the right to a jury and the State must establish commitment criteria by clear and convincing evidence. Tex. Health & Safety Code Ann. § 574.035(b)(2) (Vernon Supp. 2003). Renewal is for no more than twelve months. Tex. Health & Safety Code Ann. § 574.066(f) (Vernon

1992). As previously noted, under the Act commitment is for an indefinite period. Tex. Health & Safety Code Ann. § 841.081 (Vernon Supp. 2003). A person committed under the Act does not receive a post-commitment hearing to determine if he or she still meets commitment criteria unless: (1) the trial court, in a biennial review, finds that there is probable cause to believe that the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence; (2) the case manager determines that the person's behavioral abnormality has changed in the same way and the person petitions for release; (3) the proposed patient files an unauthorized petition for release that the judge does not find to be frivolous; or (4) the proposed patient files a subsequent unauthorized petition for release and the judge chooses to set a hearing, where there is probable cause to believe that the petitioner is no longer likely to engage in a predatory act of sexual violence. *Id.* §§ 841.102(c)(2), 841.121(a)-(c), 841.123(c)-(d).

In summary, those who are under ordinary civil commitment are committed for a specific period of time, and renewals are treated the same as new commitments. The patient subject to possible renewal is entitled to a hearing, before a jury if desired, where the State has the burden to establish commitment criteria by clear and convincing evidence. On the other hand, the person committed under the Act is committed, not for a set period, but until the person no longer meets the commitment criteria. The person is not automatically entitled to a hearing absent a finding by the judge that probable cause exists that the person no longer meets the commitment criteria, or a finding by the case manager that the person no longer meets the commitment criteria, or, in a first unauthorized petition for release, the trial court does not find that his or her petition is frivolous. I also note that a trial court, in any subsequent unauthorized petition for release, may deny the petition if a previous petition was frivolous or if, after hearing, it was determined that the petitioner's behavioral abnormality had not changed to the extent that the petitioner no longer met the commitment criteria. *Id.* § 841.123(c).

The distinction made between the methods for determination of continuation or renewal of commitment as between those committed in ordinary civil commitment proceedings and those committed under the Act does not relate to the type of custodial or medical care to be given to the two classes, but to the opportunity afforded to the person committed to show whether the person is mentally ill at all. I conclude that the distinctions between the two classes of persons committed have no relevance in this context. Therefore, I conclude, contrary to the majority, that the Act violates appellants' rights under the Equal Protection Clause of the United States Constitution.

Appellee Molett suggests that the legislature has determined that those committed under the Act are less amenable to traditional mental illness treatment modalities

and that, applying the equal protection rational basis test, the differences between the two procedures are rationally related to the governmental interest to be furthered. The apparent governmental purpose in the distinction between the two classes is to avoid the cost and expense of full-scale hearings in those cases where there is no reasonable indication that their propensity for committing violent sexual offenses has changed. Even if one is to assume, as suggested by the legislature and the appellees, that those committed under the Act are less amenable to traditional mental illness treatment modalities, neither suggests that those committed under the Act are receiving traditional mental illness treatment modalities. In fact, the treatment plan may include monitoring the person committed under the Act with a polygraph or plethysmograph. Tex. Health & Safety Code Ann. § 841.083(a) (Vernon Supp. 2003). These do not appear to be traditional mental illness treatment modalities. Consequently, I see no rational basis for the distinction between those subject to ordinary civil commitment and those subject to review under the Act with respect to the procedure for determining whether they still meet the criteria for commitment so as to justify their continued commitment. I would sustain issue IV.C.

REMEDY

If issues IV.A, II.F. and IV.C. were sustained what is the appropriate remedy? Having determined 841.082(a)(9) is unconstitutional under both the separation of powers and the void for vagueness doctrines, the obvious remedy is to enjoin its use as a penal statute.

While the appellants framed their issue with reference to the unconstitutionality of section 841.102 of the Act, their argument of necessity has required a consideration of the effects of sections 841.101, 841.121, 841.122, and 841.123(c) and (d), all of which deal with subsequent determinations as to whether the person committed still meets commitment criteria. I would declare that section 841.123(c) and (d) are unconstitutional because they provide that in certain circumstances those committed under the Act would not have an annual hearing in which the State would have the burden of proof, whereas those committed in an ordinary civil commitment would have such a hearing.

Having determined those provisions of the Act to be unconstitutional, I must next determine whether the remainder of the Act must fail as well. The Act contains no savings or severability clause. While the absence of such a clause in a legislative act is an important factor in determining the ultimate effect on the whole act of striking a part, that factor alone is not necessarily controlling. *Harris County Water Control & Improvement Dist. No. 39 v. Albright*, 153 Tex. 94, 98, 263 S.W.2d 944, 947 (1954). The remainder of the Act fails only if it appears that this offending provision is not separable from the remainder. *Id.* I would hold it

severable unless it appears that the legislature would not have enacted the section without the offending provision, or that the remainder does not present an independent, complete and workable whole without it. *Id.* There is nothing in the record that would indicate that the legislature would not have enacted the section without the offending provision. Rather, the Act, without the offending provision, addresses the concerns of the legislature found in section 841.001. Also, I find that the remainder of the Act, without the offending provision, presents a complete and workable whole.

Accordingly, I would reverse the judgment below and declare (1) that section 841.082(a)(9) is unconstitutional under both the separation of powers and the void for vagueness doctrines and prohibit its use as a penal statute, (2) that section 841.123(c)-(d) of the Texas Health & Safety Code is unconstitutional because it violates the appellants' rights under the Equal Protection Clause of the United States Constitution, and, as a result, a person committed under the Act who presents an unauthorized petition for release as provided in section 841.122 of the Act is entitled to the hearing provided in section 841.124 of the Act. I would further declare that section 841.123(c)-(d) is severable from the remainder of the Act, which remains in full force and effect. I would also declare that the meetings of the multidisciplinary team are subject to the Texas Open Meetings Act. Since the issues relating to the need of or form of injunctive relief would best be determined by the trial court, I would reverse the judgment and remand this cause for further proceedings consistent with this opinion.

DON BURGESS

Justice

Dissent Delivered

December 19, 2002

Publish

1. Billy Johnson, Franklin Duane Walston, Marvin Wesley Hendon, Kendrick Douglas, Carlos Cortez, Jeffrey Scott Quintana, Gerome Ellis Alexander, Del Ernest Wolford, Ronnie Lee Dyer, Bennie Green, Bruce McCain, Anthony D'Angelo, Daniel Craig Weeks and Jerry Reed.

2. Tex. Health & Safety Code Ann. § 841.085. Criminal Penalty

A person commits an offense if the person violates a requirement imposed under Section 841.082. An offense under this section is a felony of the third degree

3. Tex. Health & Safety Code Ann. § 841.082. Commitment Requirements

(a) Before entering an order directing a person's outpatient civil commitment, the judge shall impose on the person requirements necessary to ensure the person's compliance with treatment and supervision and to protect the community. The requirements shall include:

- (1) requiring the person to reside in a particular location;
- (2) prohibiting the person's contact with a victim or potential victim of the person;
- (3) prohibiting the person's use of alcohol or a controlled substance;
- (4) requiring the person's participation in a specific course of treatment;
- (5) requiring the person to submit to tracking under a particular type of tracking service and to any other appropriate supervision;
- (6) prohibiting the person from changing the person's residence without prior authorization from the judge and from leaving the state without that authorization;
- (7) if determined appropriate by the judge, establishing a child safety zone in the same manner as a child safety zone is established by a judge under Section 13B, Article 42.12, Code of Criminal Procedure, and requiring the person to comply with requirements related to the safety zone;
- (8) requiring the person to notify the case manager within 48 hours of any change in the person's status that affects proper treatment and supervision, including a change in the person's physical health or job status and including any incarceration of the person; and
- (9) any other requirements determined necessary by the judge.

4. Appellants do not argue that any of the eight statutory imposed requirements are unconstitutionally vague; therefore I do not include those in my analysis.

5. Certainly, a persuasive argument can be made under this constitutional concept also.

